IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 70 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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BARAIYA LAKHABHAI DUDHABHAI

Versus

STATE OF GUJARAT

Appearance:

1. Special Criminal Application No. 70 of 2001

MR LR PATHAN for Petitioner

MR HL JANI, Learned APP for Respondents

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 20/07/2001

ORAL JUDGEMENT

1. Heard Mr.L.R.Pathan, learned advocate appearing on behalf of the petitioner and Mr.H.L.Jani, learned APP appearing on behalf of the respondents.

2. In the present petition, the show cause notice has been issued by the Sub-Divisional Magistrate, Mahuva on 30/8/1999 under Section 59 of the Bombay Police Act,

1951 (hereinafter be referred to as "the Act"). Thereafter, the order of externment has been passed in Externment Case No.24 of 1999 under Section 56 (a) and (b) of the Act by the Sub-Divisional Magistrate, Mahuva on 29/2/2000. The appeal has been preferred by the present petitioner under Section 60 of the Act, the same has been rejected by the Appellate Authority on 17/6/2000. The petitioner has submitted the reply of the show cause notice and the order of externment which has been passed under Section 56 (a) and (b) of the Act. No affidavit-in-reply has been filed by the respondents.

3. Mr.L.R.Pathan, learned advocate for the petitioner has submitted that various grounds have been raised by the petitioner for challenging the externment order as well as the order of the Appellate Authority. But according to him, one contention is enough to vitiate the order of externment. Mr.Pathan has also submitted that the show cause notice has been issued by the Sub-Divisional Magistrate, Mahuva under Section 59 of the Act to the petitioner, wherein, the concerned Authority has not disclosed any material in respect to the statement of secret witnesses against the present petitioner. No whisper has been made in the show cause notice that statement of the secret witnesses have been obtained, which have been adverse to the petitioner. However, he has also submitted that looking to the externment order dated 29/2/2000, it is clear that the statement of the secret witnesses have been taken into account while coming to the conclusion against the present petitioner. The learned advocate for the petitioner has also submitted that the above material has been taken into account and the same is relied and referred to in the order of externment and the same material, if, it is not disclosed to the petitioner in the show cause notice, the same amounts to denying the legal rights to the petitioner to give effective reasonable opportunity against the such material, which has been adverse to the petitioner. Mr.Pathan has also submitted that even looking to the order of appellate authority, it is clear that it has also considered the statement of the secret witnesses against the petitioner while rejecting the appeal and, therefore, the effective reasonable opportunity, which is real purpose of enacting of Section 59 of the Act, is frustrated and the order of externment has been passed by the concerned authority against the principles of natural justice. Therefore, both the orders are required to be quashed and set aside.

4. Mr.H.L.Jani, learned APP appearing on behalf of the respondents has submitted that the statement of

secret witnesses have been recorded and the same have been relied upon by the respondent No.1 at the time of passing of externment order against the present petitioner but show cause notice has remained silent and no fact has been disclosed by the respondent No.1 that a show cause notice has been issued while relying upon the statement of secret witnesses but he submitted that looking to the offence alleged to have committed by the present petitioner and looking to the activities and evidence collected by the respondent No.1, order of externment has been rightly passed by the respondent No.1 with full application of mind and it is legal and valid order which does not required any interference by this Court.

5. I have heard the learned advocate appearing on behalf of the respective parties. In the present petition, one contention which has been raised by the learned advocate Mr.Pathan in the grounds of the petition that statement of secret witnesses which have been recorded by the concerned authority and the same has been relied by the respondent No.1 at the time of passing the externment order but this fact has not been disclosed by the respondent No.1 in show cause notice, no statements were supplied to the present petitioner and, therefore, according to Mr.Pathan, effective reasonable opportunity which required to be given by the respondent No.1 before passing the externment order as per Section 59 is not given to the petitioner and, therefore, the order of externment is required to be set aside.

6. The relevant provision of Section 59(1) of the Bombay Police Act, 1951 which is relevant to the facts of the present case, are quoted as under :-

> "59. Hearing to be given before order under Sections 55, 56 or 57 is passed :-
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> (1) before an order under Section 55, 56 or 57 is passed against any person the officer acting under any of the said sections or any officer above the rank of an Inspector authorized by that officer shall inform the person in writing of the general nature of the material allegations against him and give him a reasonable opportunity of tendering an explanation regarding them. If such person makes an application for the examination of any witness produced by him, the authority or officer concerned shall grant such application; and examine such witness, unless for reasons to be recorded in writing, the

authority or officer is of opinion that such application is made for the purpose of vexation or delay. Any written statement put in by such person shall be filed with the record of the case. Such person shall be entitled to appear before the officer proceeding under this section by an advocate or attorney for the purpose of tendering his explanation and examining witnesses produced by him.

(2) -----"

7. While reading sub section referred to above, it is important to note that it is the duty of the respondent No.1 to give reasonable opportunity to the petitioner before passing the externment order against the petitioner. The language which has been used in a particular section is provided that the officer shall inform the person in writing of the general nature of the material allegations against him and give him a reasonable opportunity of tendering an explanation regarding them. Therefore, this is a reasonable opportunity of tendering explanation given by the petitioner which requires to be satisfied before passing the externment order against the present petitioner.

8. In the present case, there is no dispute on record that in show cause notice, no such material is referred by the respondent No.1 that statement of the secret witnesses were recorded and obtained by the concerned authority. This fact has not been disclosed in the show cause notice which has been served to the petitioner. In light of this undisputed fact, the view taken by the Division Bench of this Court in the case of Rambhai Khimchand v/s. State of Gujarat, reported in 1990 (2) G.L.H. 617, this Court has made observations in para-(9) are as under :-

"9. As far as the present case is concerned, it cannot be said that unsubstantial or non existent ground has been taken into consideration, but a ground which is germane for the purpose of externing a particular person has been taken into consideration by the externing authority without putting the externee on notice as regards that ground. If that be so, the Court cannot substitute objective judicial test for the subjective satisfaction of the executive authority and come to the conclusion that the executive authority, dehors the said ground which has not been put on notice to the externee was

able to arrive at a decision for the purpose of externing the person concerned in that particular case. Thus, it is clear that reference to a particular instance such as persons of status and means have shifted from the locality so that they may not become the victim of such tort committed by the petitioner herein is a clear instance to show that the activities of the petitioner concerned have reached that degree or harm to the society that the interest of the society or even of that particular locality required that this individual who has become a publici menace should be externed from the locality. This particular instance has not been put on notice to the externee though it finds place in the externment order. natural justice requires that the person affected should have notice of the relevant materials on which the authority concerned bases its conclusion. The fact that the person with status and means have shifted from their place so that they may not become victim of such torts by the externee concerned is one of the essential and relevant circumstance of externing a person. This essential circumstance on which the externing authority relied was not put on notice to the externee. As we have stated already this circumstnce finds place in the order of externment. The failure on the part of the externing authority to put on notice to the externee regarding this particular circumstance, in our opinion, clearly vitiates the order of externment and offers the principle of fair play and justice. For all these reasons the order of externment is quashed and set aside. Rule is made absolute."

In a decision rendered by the Bombay High Court in case of Mehmood Babu Kawal @ Dawarya Shaikh v/s. Assistant Commissioner of Police, City Station, Pune, reported in 1991, Cr.L.R. (Mah.) 359, wherein The Bombay High Court has made following relevant observations ;

"2. With the Assistance of the learned counsel of both the parties, we have gone through the show cause notice dated 9th January, 1990 issued under Section 56-B of the Bombay Police Act as well as the Order of Externment passed under Section 56 of the said Act. On perusal of the show cause notice and the order of externment, we find that the order of externment specifically catalogues three criminal cases

under Prohibition Act registered and pending against the Externee. The said cases were not referred to at all in the show cause notice. A perusal of the impugned order further shows that the Externing Authority has in fact taken into consideration the fact that the petitioner deals in the sale of liquor and has been involved in offences under the Prohibition Act which is clear from his satisfaction recorded below the catalogue. He has stated that after considering the entire evidence place before him and the reply advanced, he is satisfied that the proposed externee deserves to be externed. it is thus apparent that material extraneous to the show cause notice was taken into consideration at the time of passing of the order of Externment and therefore, the order of externment is vitiated having been passed against the principles of natural justice. On this ground alone, the impugned order is liable to be set aside. We further find that in the show cause notice about 5 incidents of criminal acts of the proposed externee were cited but the date and the time of the incidents had been mentioned without reference to the locality where the alleged incident had taken place. A general nature of material particulars is necessary to be given to the proposed Externee so as to offer him adequate opportunity to show cause against the allegations. In the instant case, since various localities of Pune City are allegedly affected by the prejudicial activities of the proposed externee, it was necessary to give general particulars of the area where the alleged incidents had taken place. For all these reasons, stated above, we find that the order of externment is vitiated and has to be set aside."

In one more decision rendered by this Court in case of Aswin Chandulal Jaishwal Vs. The Deputy Commissioner of Police, Vadodara City, reported in 1989 Cr.L.R. (Gujarat) 517, wherein this Court has in para-(9) made following relevant observations :-

"9. Shri has also stated in his affidavit that the Inspect, Police Station, Vadodara, had recorded statements of 11 persons in confidence. he further stated that he had applied mind on the relevant material of the case produced before him, which includes the statement of the persons recorded by the police. It is not stated that in

> the notice that the statements of the witnesses were recorded by the police. If at all any such statements would have been recorded and intended to be relied upon, such statements would have been recorded and intended to be relied upon, at least, reference of the statements, without disclosing the names, with the time and place of such alleged illegal activities of the petitioner should have been made in the notice so that the petitioner could have got an opportunity to explain the said circumstances or lead evidence. Without giving him an opportunity or even letting the petitioner know that statements were recorded, the Deputy Commissioner of Police has relied on statements of 11 persons. It is true that general allegations are only required to be made in the notice, but when statements are relied upon for the externment order at least, the person to be affected by such order should be given an opportunity to explain at least the general nature of allegations in the statements. The petitioner was, therefore, deprived of the opportunity to explain the circumstances, which weighed considerably with the Externing Authority and, therefore, also the order vitiates."

9. I have considered the observations made by the Division Bench of this Court as well as the Bombay High Court. The material question is that before passing the externment order, show cause notice is necessary and the same has been considered to be as mandatory then it is the duty of the respondent No.1 to give effective and reasonable opportunity to the petitioner referring all the materials taken into consideration by the respondent No.1. If any material is left out and not disclosed in the show cause notice and the same is considered in the externment order, then it amounts to not giving an effective and reasonable opportunity for tendering explanation against the show cause notice and the real purpose an object of Section 59(1) as enacted by the Legislature will be frustrated. if any material which has been taken into account by the respondent No.1 while passing the externment order, in that case, it ought to have been disclosed to the petitioner in the show cause notice so that the petitioner can effectively represent his case against the adverse material which has been collected and considered by the respondent No.1. Therefore, according to my opinion, the respondent No.1 has not given an effective reasonable opportunity to the petitioner and the order of externment which has been passed by the respondent No.1 against the petitioner is

in fact passed in violation of principles of natural justice and, therefore, the order of externment 29/2/2000 and the order of the appellate authority dated 17/6/2000 deserve to be quashed and set aside.

10. In the result, the present petition is allowed. The order of externment passed against the present petitioner dated 29/2//2000 and the order passed by the appellate authority dated 17/6/2000 are hereby quashed and set aside. Rule is made absolute accordingly.

(H.K.Rathod,J.)

(vrpanchal)**